

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1785

STATE OF WISCONSIN

Cir. Ct. No. 2008TR5847
2008TR5848

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF WISCONSIN DELLS,

PLAINTIFF-RESPONDENT,

V.

RYAN N. ROEDER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Ryan Roeder appeals the judgment of conviction for operating while under the influence of an intoxicant (OWI), in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(a), first offense. He contends the traffic stop by the arresting officer was not supported by reasonable suspicion or probable cause and the circuit court therefore erred in denying his motion to suppress. He also contends the circuit court erroneously exercised its discretion in making two evidentiary rulings at trial. We conclude the circuit court did not err and did not erroneously exercise its discretion. Accordingly, we affirm.

DISCUSSION

I. Lawfulness of Stop

¶2 Roeder was stopped by Wisconsin Dells police officer Scott Albrecht for failure to signal and was subsequently given a citation for OWI and for driving with a prohibited alcohol concentration, in violation of WIS. STAT. § 346.63(1)(b). He moved to suppress evidence on the ground that the stop was unlawful because it was not supported by either reasonable suspicion or probable cause.

¶3 At the hearing on the motion, Officer Albrecht was the only witness. He testified that he was on duty in the early morning of the day of the arrest, traveling in his marked squad car westbound on Highway 13. As one approaches the intersection with Highway 12, the main intersection in the City of Wisconsin Dells, the two westbound lanes of Highway 13 become four lanes. As marked on the pavement and in overhead traffic signs, the lane farthest left allows a left turn only; the next lane to the right allows vehicles to either turn left or go straight ahead; the next lane to the right allows vehicles to proceed only straight ahead; and the far right lane allows a right turn only.

¶4 As Officer Albrecht approached the intersection, he was in the second lane from the left and so could either turn left or proceed straight ahead. The traffic light was red and Roeder's vehicle was stopped in the same lane about one car length directly ahead of Officer Albrecht's car. When the traffic light turned green, Roeder turned left onto Highway 12 without activating his left turn signal. The traffic was medium. There was a vehicle in the westbound left-turn-only lane just to the left of Roeder's vehicle and a vehicle in the far right lane; there were also vehicles stopped at the light that were going eastbound on Highway 13 and turned right onto Highway 12.

¶5 Officer Albrecht also turned left, remaining about two car lengths behind Roeder, and he stopped Roeder for failure to signal as soon as they were through the intersection. In the officer's view, Roeder's failure to signal impeded traffic.

¶6 In addition to the officer's testimony, the videotape from his squad car as he approached the intersection was introduced into evidence.

¶7 WISCONSIN STAT. § 346.34(1)(b) provides: "In the event any other traffic may be affected by such movement, no person may so turn any vehicle without giving an appropriate signal in the manner provided in s. 346.35." "[S]o turn" refers to the turns described in § 346.34(1)(a), which include a turn at an intersection. § 346.34(1)(a)1.

¶8 The circuit court applied the probable cause standard rather than that of reasonable suspicion, relying on *State v. Longcore*, 226 Wis. 2d 1, 8, 594 N.W.2d 412 (Ct. App. 1999) (holding that probable cause rather than reasonable suspicion is the appropriate standard when the officer observes what he or she believes is a traffic violation). Based on the officer's testimony and the videotape,

the court found that for eastbound traffic it would be important to know if Roeder were turning right or going straight ahead and that the officer in his squad car directly behind Roeder would also be affected by what Roeder did because he would accelerate differently. The court concluded the officer had probable cause to believe that Roeder's failure to signal affected other traffic.

¶9 Roeder contends the court erred because there was evidence that eastbound traffic turning right was regulated by a traffic light and because, by the time eastbound traffic merged into his lane, he would be out of the intersection, heading southbound, and would have the right of way.

¶10 The temporary detention of individuals during the stop of an automobile by the police constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment.² *Whren v. United States*, 517 U.S. 806, 809-10 (1996). An automobile stop is thus subject to the constitutional imperative that it not be "unreasonable" under the circumstances. *Id.* at 810. A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, *id.*, or have grounds to reasonably suspect a violation has been or will be committed. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

¶11 In his brief, Roeder sets forth the standard for reasonable suspicion, but he also argues there was no "probable cause" for the stop. The State responds

² Both the Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution guarantee the right of citizens to be free from unreasonable searches and seizures. In general, the Wisconsin Supreme Court follows the United States Supreme Court's interpretation of the search and seizure provision of the Fourth Amendment in construing the same provision of the state constitution. *State v. Fry*, 131 Wis. 2d 153, 171-72, 388 N.W.2d 565 (1986).

there was probable cause for the stop. We will therefore use the higher probable cause standard.

¶12 Probable cause exists when, under the circumstances, the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed an offense. See *State v. Woods*, 117 Wis. 2d 701, 710-11, 345 N.W.2d 457 (1984). "When an officer observes unlawful conduct[,] ... the observation of unlawful conduct gives the officer probable cause for a lawful seizure." *State v. Waldner*, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Probable cause exists where the facts and circumstances within the arresting officer's knowledge, of which he or she has reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Draper v. United States*, 358 U.S. 307, 313 (1959). "Probable cause is a common sense test that looks to the totality of the circumstances facing the officer at the time of the [stop] to determine whether the officer could have reasonably believed the defendant had committed, or was committing, an offense." *Longcore*, 226 Wis. 2d at 8 (citation omitted).³

¶13 We uphold the trial court's findings of fact unless they are clearly erroneous. See *State v. Guzy*, 139 Wis. 2d 663, 671, 407 N.W.2d 548 (1987). However, whether the facts found by the circuit court or the undisputed facts are sufficient to fulfill the constitutional standard is a question of law, which we

³ Under the lower reasonable suspicion standard, the law does not require an officer to observe unlawful conduct; rather, under the totality of the circumstances, the officer must consider all the facts together and "as they accumulate," draw "reasonable inferences about [their] cumulative effect." *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996).

review de novo. *State v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63 (Ct. App. 1991).

¶14 We agree with the circuit court that Officer Albrecht had probable cause to believe that Roeder’s failure to signal a left turn might have affected other traffic. The statute does not require that the failure to signal had the effect of impeding traffic⁴ or that it actually caused a problem to other traffic; rather the statute penalizes a failure to signal a turn when “any other traffic may be affected by such movement.” WIS. STAT. § 346.34(1)(b). A reasonable officer could believe that in medium traffic at an intersection of two state highways, which is the main intersection of the city, the vehicle directly behind Roeder, the vehicle to the left of him in the left-turn-only lane, and the on-coming traffic would all be affected by whether he was going straight ahead or turning left once the light turned green. It is reasonable to believe that the drivers of one or more of these other vehicles would alter either their degree of acceleration or their timing or their lane choice based on whether Roeder was turning left or proceeding straight through the intersection.

II. Evidentiary Rulings

¶15 Roeder challenges two evidentiary rulings at trial: admitting a certified intoximeter maintenance report, with accompanying certified assay

⁴ We recognize that Officer Albrecht used the word “impeding,” but we apply an objective standard—would a reasonable officer in the circumstances of Officer Albrecht believe it was probable that Roeder’s failure to signal a left turn might have affected other traffic. *See State v. Kutz*, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

report,⁵ and precluding cross-examination of Officer Albrecht on his interpretation of WIS. STAT. § 346.34(1)(b) and other statutes.

¶16 In general, the admission and exclusion of evidence is a matter within the discretion of the circuit court. *State v. Brewer*, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995). We affirm a discretionary decision if the circuit court applied the correct legal standard to the relevant facts and reached a reasonable result using a rational process. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶17 With respect to the certified intoximeter maintenance report, the prosecutor moved for its admission during his examination of Officer Albrecht. When the court asked if Roeder's counsel had an objection, he stated: "I agree that they are within the exception to the hearsay rule as they are public records regularly kept in the course of business. And pending foundation I would reserve objection to their admissibility based on relevance." The court responded: "Well, I'm going to receive them. And you can do your cross-examination and give them such—the jury will give them such weight as they need to."

¶18 Roeder's argument on appeal is insufficiently developed. He states in a cursory manner that the evidence was received "without any indication of reliability or opportunity of the defendant to cross-examine on the reliability of the evidence." He does not relate this objection on appeal to the objection he made in the circuit court, which appears to be framed as a relevancy objection. He does

⁵ Roeder mentions exhibit 5, which is the intoximeter maintenance report, and exhibit 6, which is a map of the Wisconsin Dells that he used for cross-examination of Officer Albrecht. Because we do not understand how Roeder can be objecting to the admission of the map, which was apparently his exhibit, we discuss only the intoximeter maintenance report.

not explain what cross-examination of Officer Albrecht he was prevented from undertaking regarding this report. We decline to address this issue further.

¶19 With respect to the limitation on questioning Officer Albrecht on the statutes, Roeder's counsel asked the officer about his interpretation of WIS. STAT. § 346.34 and of § 346.31, which addresses "[r]equired position and method of turning at intersections." When the officer responded that he would need to read § 346.31 to see how he would interpret it, the prosecutor objected on the ground that this was not relevant to the OWI charge being tried. Roeder's counsel explained that he wanted to impeach the officer by showing the jury that he did not pull Roeder over for a turn signal violation but simply because it was three o'clock in the morning and the officer thought Roeder was drunk.

¶20 The circuit court recognized that in Roeder's trial testimony he had disputed that he had acted unlawfully in not putting on his left turn signal and that he was trying to show that he had not engaged in any "bad driving." However, the court stated, allowing cross-examination of the officer to attempt to support Roeder's position would confuse the jury by suggesting that the stop had been unlawful. The court decided that whether Roeder did or didn't violate WIS. STAT. § 346.34 was of marginal relevance to whether he was driving while intoxicated and the confusion that would be created by this tangent outweighed any relevance. Accordingly, the circuit court ruled that Roeder could not pursue this line of questioning, although it did permit Roeder's counsel to ask Officer Albrecht if he had given Roeder a citation for failure to use his turn signal.

¶21 We conclude the circuit court properly exercised its discretion in making this ruling. WISCONSIN STAT. § 904.03 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The circuit court engaged in a logical analysis that took the relevant facts into account and applied the correct law. It was reasonable for the court to conclude that Roeder’s efforts to show that he had not violated WIS. STAT. § 346.34, through cross-examination of Officer Albrecht, would involve a lengthy and confusing digression that was only minimally relevant to whether Roeder was driving while intoxicated.

CONCLUSION

¶22 We conclude the circuit court did not err in denying the suppression motion and did not erroneously exercise its discretion in the two challenged evidentiary rulings. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

